IN THE SUPREME COURT

STATE OF ARIZONA

CAREY D. DOBSON, WILLIAM EKSTROM, TED A. SCHMIDT, and JOHN THOMAS TAYLOR III, Petitioners, v. STATE OF ARIZONA ex rel. COMMISSION ON APPELLATE COURT APPOINTMENTS, Respondent.	Supreme Court No. CV-13-0225-SA

REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION

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INTRODUCTION

In 1974, the People of Arizona (the "People") adopted merit selection as their preferred system for the selection of all appellate judges and trial judges in the state's largest counties. As the State acknowledges in its response to the Petition for Special Action (the "Response"), this fundamental change in judicial selection vested the Commission on Appellate Appointments (the "Commission") with the "definitive gatekeeping function upon which merit selection turns." But the State ignores that the Commission's "gatekeeping function" is prescribed *exclusively* by Article VI, § 37 of the Arizona Constitution and cannot be altered by the Legislature.

Through the power of initiative, the People required that the Commission send "not less than three" nominees to the Governor for each judicial vacancy without requiring a supermajority vote. Unsatisfied with this clear constitutional command, this spring the Legislature passed H.B. 2600, which purports to amend Article VI, § 37 by requiring the Commission to submit at least five candidates unless two-thirds of the Commission approves a smaller number. The State seeks to justify this legislative amendment as a mere "procedural" device that reflects the growth of the Arizona Bar and the supposed need for a larger pool of judicial candidates. But the State's arguments are beside the point. Whatever the wisdom of H.B. 2600, and regardless of whether it is characterized as "procedural" or "substantive," the Legislature may not alter the merit system scheme established in the Constitution.

To ensure that only qualified candidates are submitted to the Governor for consideration, Article VI, § 37 permits the Commission to narrow the Governor's choices to as few as three names. H.B. 2600 seeks to strip that discretion by "giving the Governor more choices" at the expense of the Commission's constitutional authority to limit the Governor's choices. The Court should invalidate this attempt to amend the Constitution by legislative fiat.

JURISDICTION

The State originally argued [at 3] that the Court lacks jurisdiction over this Petition under Article VI, § 5(1) of the Arizona Constitution because "Petitioners do not bring their claims against a State officer against whom a writ can issue." The State has since correctly withdrawn that argument. In its "Stipulated Motion to Withdraw Argument," filed on August 5, 2013, the State acknowledged [at 1-2] that:

> Chief Justice Rebecca White Berch is a State officer who could be properly the subject of a writ of mandamus in her official capacity as chairperson of the Commission on Appellate Appointments. Thus, if the Court finds in favor of the Petitioners, the Writ could issue to the Chief Justice or to the Commission as a whole.

The State's stipulation reflects that an injunction against the Respondents here—namely, the "State of Arizona *ex rel.* the Commission on Appellate Court Appointments"—necessarily would bind the "state officers" who carry out the Commission's function (including the Chief Justice of the Arizona Supreme Court). *See Bussart v. Super. Ct.*, 11 Ariz. App. 348, 351, 464 P.2d 668, 671 (1970) ("A

party's agents, attorneys, and persons in active concert or participation with him are among those who may be bound [by an injunction]."). Moreover, the Rules of Procedure for Special Actions make clear that special action relief is available against both "officer[s]" and "bod[ies]." *See* Ariz. R. P. Spec. Action 1(a).

Even if the Court concludes that it does not have jurisdiction under Article VI, § 5(1), it should accept jurisdiction under Article VI, § 5(4) which grants this Court original jurisdiction "to issue injunctions and writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." That provision makes no reference to "state officers," and has been previously invoked by the Court as the jurisdictional basis on which to accept jurisdiction over an original special action. *See Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469 ¶ 2, 212 P.3d 805, 807 (2009) ("We have jurisdiction under Article 6, Section 5(1), (4), of the Arizona Constitution and Arizona Rule of Procedure for Special Actions 4(a).").

STANDING

The State argues [at 4-5] that Petitioners are pursuing "organizational claims" on behalf of the Commission, which they have no standing to bring under *Bennett v. Napolitano*, 206 Ariz. 520, 81 P.3d 311 (2003). But unlike the Speaker of the House and President of the Senate in *Bennett*, Petitioners here do not purport to act on behalf of the Commission "as a whole." Rather, as explained in the Petition [at 4], Petitioners bring their claims as *individual* members of the Commission, each

of whom has "the constitutionally delegated discretion to nominate as few as three judicial candidates, and . . . the constitutional obligation to nominate at least three candidates." Petitioners bring this Petition because they do not want to violate that constitutional scheme in performing their official duties, as H.B. 2600 would lead them to do. Petitioners unquestionably have a "direct interest" in the outcome of this litigation, and thus have made the requisite showing of standing.

In all events, this Court is not "constitutionally constrained to decline jurisdiction based on lack of standing," and has waived that requirement in cases "involving issues of great public importance that are likely to recur." *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 25, 961 P.2d 1013, 1019 (1998); *see Rios v. Symington*, 172 Ariz. 3, 5, 833 P.2d 20, 22 (1992) (accepting jurisdiction notwithstanding "potential standing issues" because the action involved a "dispute at the highest levels of state government"); *Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 714 P.2d 386 (1986) (addressing the constitutionality of the State's municipal annexation statute without addressing standing). H.B. 2600's attack on the Commission's independence presents just such an issue of great public importance that will affect each of the Commission's judicial nominations going forward absent judicial intervention.

RESPONSE TO THE STATE'S "STATEMENT OF FACTS"

This Petition presents purely legal questions that are ripe for adjudication. The only "facts" that matter to the Petition are the language of the relevant constitutional and statutory provisions. In an attempt to manufacture a factual

dispute, however, the Response detours into irrelevant factual matters and proclaims the need to "develop an appropriate record." [Resp. at 4-7 & n.2]

For example, the State's "factual" arguments regarding the growing size of the Arizona Bar, which it characterizes [at 6] as a "dramatic increase in potential judicial candidates" have absolutely no bearing on this case.[1]

Similarly, its assertion [at 7]—citing statements from the legislative sponsor of H.B. 2600—that the court of appeals judges who applied for the recent Supreme Court vacancy and whose names were not forwarded had their "continued public service aspirations . . . terminated for no reason except the rigid artificial adherence to a 39-year-old procedural benchmark" is not a "fact" at all, but merely an unsupported statement of individual legislative intent.

More fundamentally, these purported "facts" are merely an attempt to explain the supposed wisdom of H.B. 2600. But no set of facts can justify a legislative amendment to the Constitution.

Finally, the State's expanded chart [at 9] of the similarities and differences between Article VI and H.B. 2600 is both telling *and* misleading. It is telling because the State necessarily acknowledges that H.B. 2600 changes the unambiguous requirement that the Commission send "not less than three" nominees to the Governor to "at least five." It misleads by suggesting that H.B.

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[1] The size of the Bar does not determine the number of candidates who apply for a judicial position, nor does it support the conclusion that all of those who do apply are qualified for that position. [*See* Pet. at 11 n.5 (describing the small number of applicants for certain recent vacancies)]

2600 is constitutionally insignificant because it alters only two of eight "divisions" of Article VI. But of course, the Legislature does not get a free pass to tinker with the Constitution, no matter the number of constitutional provisions it seeks to alter.

ARGUMENT

As set forth in the Petition, H.B. 2600 should fall because it runs afoul of Article XXI of the Arizona Constitution, which establishes the exclusive means by which any provision of the Arizona Constitution, including Article VI, § 37, can be amended.

I. H.B. 2600 VIOLATES ARTICLE XXI OF THE ARIZONA CONSTITUTION BECAUSE IT PURPORTS TO AMEND THE CONSTITUTION BY STATUTE.

The State argues that H.B. 2600 "reasonably supplements" the merit selection process, and does not "interfere[] with, frustrate[], or diminish[] the constitution." [Resp. at 11 (citing, *e.g.*, *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 119 ¶ 59, 290 P.3d 1126, 1242 (App. 2012); *Turley v. Bolin*, 27 Ariz. App. 345, 348, 554 P.2d 1288, 1291 (1976) ("The question thus becomes whether the statutory provision here involved implements or supplements the above-quoted constitutional provision and does not unreasonably hinder or restrict the [right granted therein]."))] But H.B. 2600 does not "reasonably supplement" Article VI, § 37. Rather, it interferes with, frustrates, and diminishes the clear command of the People that the Commission send "not less than three" judicial nominees to the Governor (with a simple majority vote), leaving it to the Commission's discretion

as gatekeeper to send more nominees if it believes the applicant pool so warrants (again, by a simple majority vote).

If the State's logic were accepted, it would give the Legislature license to increase the minimum number of nominees forwarded to the Governor to *any* number—8, 10, 12, or more—or allow names to be forwarded to the Governor with less than a majority vote, or require any names sent to have a supermajority vote. This is constitution redrafting writ large.

Nor, contrary to the Response [at 11-12], can *Turley* be distinguished on the ground that the statute at issue there created an "absolute[] bar[]" to the filing of petitions "between four and five months prior to an election, even though such petitions were permitted by the Constitution." H.B. 2600 imposes a similar "absolute bar" by prohibiting a simple majority of the Commission from transmitting the names of only three judicial nominees to the Governor, a decision which is expressly "permitted by the Constitution." Far from providing any contrast to the statute at issue here, *Turley* proves the Petitioners' point.[2]

Equally unavailing is the State's unsupported characterization [at 12-13] of H.B. 2600 as a mere "procedural" alteration to Article VI, § 37 and a mere

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[2] *Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 5, 503 P.2d 951, 953 (1972) is not to the contrary. In that case, the Supreme Court held only that "the fact that a constitutional provision is self-executing does not forever bar legislation on the subject," and agreed with the court of appeals (without any analysis, and in vacating the court of appeals' opinion) that "the requirement that circulators of referendum petitions be qualified electors is a valid exercise of legislative power." Unlike the statute at issue in *McBrayer*, H.B. 2600 here purports to change a clear provision of the Arizona Constitution, and for that reason alone, is improper.

"implement[ation]" thereof. Far from "procedural," H.B. 2600 works a fundamental change in the constitutionally-proscribed balance of power between the Commission and the Governor. But even if H.B. 2600 could be characterized as procedural, the Legislature has no power to amend the constitutional scheme. *See Turley*, 27 Ariz. App. at 348, 554 P.2d at 1291; *see also Baker v. Bosworth*, 222 P.2d 416, 419 (Colo. 1950) (holding that a statute purporting to increase a constitutional minimum percentage of voters required to initiate a measure was unconstitutional); *State ex rel. Twichell v. Hall*, 171 N.W. 213, 219 (N.D. 1918) (holding that the legislature could not increase the constitutionally mandated "not less than 25 per cent" of voters required to initiate a measure).

If the People (in 1974) had intended to allow the Legislature to alter the minimum number of judicial nominees to be sent to the Governor, they knew well how to do so. For example, Article VI, § 2 of the Arizona Constitution provides that "[T]he supreme court shall consist of not less than five justices. ***The number of justices may be increased or decreased by law***, but the court shall at all times be constituted of at least five justices." (Emphasis added). Article VI, § 36 gives no such discretion to the Legislature.

To sanction H.B. 2600 would open the door to a whole host of legislative mischief, as multiple provisions of the Arizona Constitution would be open to similar supposed "procedural" alterations. For example, Article VI, § 36 requires that attorney members of the Commission be admitted to practice before the Supreme Court for "not less than five years" prior to their appointment. Under the State's view of the Arizona Constitution, the Legislature could, by statute, change

that constitutional requirement to "not less than twenty-five years" so long as the Legislature makes some "factual" finding that such a change is necessary. The same is true of, among other constitutional provisions, Article V, § 2 (providing that a person "of the age of not less than twenty-five years" is eligible for certain state offices) and Article IV, Part 2, § 1(2) (providing that the governor call a special session of the legislature when presented with a petition of "not less than two-third of the members of each house").[3]

Finally, the State does not deny that, on its face, H.B. 2600 would permit the Commission to send less than three nominees to the Governor. After a two-thirds vote against a particular candidate, nothing in H.B. 2600 would prohibit the Commission from submitting one or two nominees to the Governor, provided that "no more than two nominees may be from the same political party." [Pet., App. 4 at 1 ("[E]xcept that on a two-thirds vote, the commission may reject an applicant and ***submit fewer than five names***." (emphasis added)] The State argues [at 14] that the Court should engage in a "constitutional construction" that would avoid this result. But the potential to reduce the number of nominees sent to the Governor is an integral part of H.B. 2600. The State's "constitutional construction"

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[3] Indeed, the same would be true for Article I, § 2 of the United States Constitution, which provides that "each state shall have at least one Representative" in the House of Representatives. Some people might argue that it would be better if each state could have two ***or more*** representatives at a minimum. Could Congress pass a statute that each state should be entitled to at least two representatives unless two-thirds of the voters in that state voted to keep the number at one? Surely not.

argument, in reality, is a request that the Court blue pencil an overreaching enactment.

In sum, H.B. 2600 is unconstitutional because it both (1) requires the Commission to nominate at least five candidates absent a supermajority vote; and (2) permits the Commission to nominate fewer than three candidates with a supermajority vote, all contrary to the constitutional language in Article VI, § 37.

II. PETITIONERS WITHDRAW THEIR ARGUMENT THAT H.B. 2600 VIOLATES ARTICLE IV, PART 1, § 1(14) OF THE ARIZONA CONSTITUTION.

Given that the argument in Section I of the Petition clearly establishes the unconstitutionality of H.B. 2600, it is unnecessary for the Court to decide the argument made in Section II of the Petition, and Petitioners now withdraw that argument.

CONCLUSION

Whatever the Legislature may think about the judicial merit selection system currently enshrined in the Arizona Constitution, it is the system that the People chose nearly 40 years ago. Integral to that system is Article VI, § 37, which instructs the Commission to send "not less than three" judicial nominees to the Governor for each judicial vacancy, thus giving the Commission the authority to limit the Governor's choices to the best-qualified in a pool of qualified applicants. H.B 2600 purports to increase that default minimum to "at least five" unless the Commission, by a two-thirds majority, decides otherwise. This improper attempt to amend the Constitution cannot stand. Perhaps it can be argued, as the State does, that it would be better if the Governor's choices were not so

limited. But the People have decided otherwise in adopting Article VI, § 37. Only by proper constitutional amendment can that decision be changed.

Accordingly, Petitioners respectfully request that this Court: (1) issue an order declaring H.B. 2600 unconstitutional, (2) enjoin the Commission from applying H.B. 2600, and (3) award Petitioners their attorneys' fees.

Dated: August 14, 2013

Respectfully submitted,

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